



**BILLING CODE: 4310-55-P**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 21**

**[Docket No. FWS–R9–MB–2012–0027; FF09M29000–145–FXMB1232090000]**

**RIN 1018–AY60**

**Migratory Bird Permits; Removal of Yellow-billed Magpie and Other Revisions to Depredation Order**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

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**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), change the regulations governing control of depredating blackbirds, cowbirds, grackles, crows, and magpies. The yellow-billed magpie (*Pica nuttalli*) is endemic to California and has suffered substantial population declines. It is a species of conservation concern. We remove the species from the depredation order. A depredation permit will be necessary to control the species. We also narrow the application of the regulation from protection of any wildlife to protection of species recognized by the Federal Government, a State, or a Tribe as an endangered, threatened, or candidate species, or a species of special concern. We add conditions for live trapping, which are new to the regulation. Finally, we refine the reporting requirement to gather data more useful in assessing actions under the order.

**DATES:** This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION].

**FOR FURTHER INFORMATION CONTACT:** George Allen, 703–358–1825.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The U.S. Fish and Wildlife Service is the Federal agency delegated the primary responsibility for managing migratory birds. This delegation is authorized by the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 *et seq.*), which implements conventions with Great Britain (for Canada), Mexico, Japan, and the Russian Federation (formerly the Soviet Union). We implement the provisions of the MBTA through regulations in parts 10, 13, 20, 21, and 22 of the Code of Federal Regulations (CFR). Regulations pertaining to migratory bird permits are at 50 CFR 21; subpart D of part 21 contains regulations for the control of depredating birds.

A depredation order allows the take of specific species of migratory birds for specific purposes without need for a depredation permit. The depredation order for blackbirds, cowbirds, grackles, crows, and magpies (50 CFR 21.43) allows take when individuals of an included species are found “committing or about to commit depredations upon ornamental or shade trees, agricultural crops, livestock, or wildlife, or when concentrated in such numbers and manner that they are a health hazard or other nuisance.”

We established the depredation order for blackbirds and grackles in 1949 (14 FR 2446; May 11, 1949). The regulation specified that take of birds under the order was to protect agricultural crops and ornamental or shade trees. We added cowbirds to that depredation order in 1958 (23 FR 5481; July 18, 1958). In 1972, we added magpies, crows, and horned owls to the depredation order, and we expanded the order to cover depredations on livestock or wildlife or “when [the birds included in the order are] concentrated in such numbers and manner as to constitute a health hazard or other nuisance” (37 FR 9223; May 6, 1972). We removed horned owls from the order in 1973 (38 FR 15448; June 12, 1973), and we removed the tri-colored blackbird (*Agelaius tricolor*) in 1989 (54 FR 47524; November 15, 1989).

From 1989 until 2010, the depredation order at 50 CFR 21.43 pertained to “yellow-headed, red-winged, rusty, and Brewer’s blackbirds, cowbirds, all grackles, crows, and magpies.” On December 8, 2008 (73 FR 74447), we proposed “to make the list of species to which the depredation order applies more precise by listing each species that may be controlled under the order.” We issued a final rule on December 2, 2010 (75 FR 75153), which became effective on January 3, 2011, that revised 50 CFR 21.43 to include four species of grackles; three species each of blackbirds, cowbirds, and crows; and two species of magpies, including the yellow-billed magpie.

## **II. Changes to the Depredation Order**

On May 13, 2013, we published a proposed rule to further revise the depredation order (78 FR 27930), in which we proposed changes to the regulation as outlined below.

### *Removal of the Yellow-billed Magpie*

The yellow-billed magpie (*Pica nuttalli*) is an endemic species of California. It is found “primarily in the Central Valley, the southern Coast Ranges, and the foothills of the Sierra Nevada,” and is an “integral part of the oak savannah avifauna” in California (Koenig and Reynolds, 2009). Degradation of habitat is considered a threat to the species, though secondary poisoning may be a threat in some locations (Koenig and Reynolds, 2009).

The yellow-billed magpie is on the Service’s list of Birds of Conservation Concern for the California/Nevada Region (USFWS, 2008). Recently, there have apparently been severe impacts of West Nile virus on the species (Crosbie *et al.* 2008; Ernest *et al.*, 2010). Our concern for this species leads us to remove it from the depredation order. Individuals and organizations needing to deal with depredating yellow-billed magpies can apply for a depredation permit under 50 CFR 21.41.

### *Wildlife Depredation*

For wildlife protection by the public, we limit application of this depredation order, which currently covers protecting all wildlife, to only allow take without a permit for protection of: (1) a species recognized by the Federal Government as an endangered, threatened, or candidate species, in counties in which the species occurs, as shown in the Service’s Environmental Conservation Online System (<http://ecos.fws.gov>); (2) species recognized by the Federal Government as endangered or threatened, in the species’ designated critical habitat; and (3) species recognized by a State or Tribe as endangered, threatened, candidate, or of special concern on State or tribal lands. Species listed by the

Federal Government as endangered or threatened species under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), are set forth at 50 CFR 17.11(h) (for animals) and 17.12(h) (for plants), and a list of Federal candidate species is available at [http://ecos.fws.gov/tess\\_public/pub/candidateSpecies.jsp](http://ecos.fws.gov/tess_public/pub/candidateSpecies.jsp). Federal critical habitat designations are set forth at 50 CFR 17.95 for animals, 17.96 for plants, and 17.99 for plants in Hawaii.

For wildlife protection by Federal, State, and Tribal agencies, take for protection of a species recognized by the Federal Government, a State, or a Tribe as an endangered, threatened, candidate species, or a species of special concern is allowed anywhere in the United States.

For the public and Federal, State, and Tribal agencies, take to protect other species of wildlife will require a depredation permit (see 50 CFR 21.41).

### *Trapping Conditions*

We add requirements regarding the use of traps to take birds listed in the depredation order. The regulations cover locating and checking traps, releasing nontarget birds, and using lure birds.

### *Reporting*

Under the current regulations, we cannot assess impacts of this order on nontarget species. Therefore, we clarify that reporting of activities under this depredation order requires a summary of those activities and information about capture of nontarget species (see the **Regulation Promulgation** section, below).

## *Euthanasia*

We allow three methods of euthanasia that are considered humane by the American Veterinary Medical Association (2013, <https://www.smashwords.com/books/view/292011> (see the **Regulation Promulgation** section, below).

### **III. Comments on the Proposed Rule**

We received nine comments on the proposed rule. We respond to the issues raised in the comments on the proposed rule below. Similar issues are grouped for efficiency. We did not make significant changes from the proposed rule, but changes we made are noted in response to comments.

*Comment (1):* “We oppose the removal of the yellow-billed magpie from the depredation order; retaining the yellow-billed magpie in the depredation order will preserve agricultural productivity. Crop and livestock damage from wildlife can result in significant losses to agricultural producers. In 2009, the U.S. Department of Agriculture’s National Wildlife Research Center estimated economic impacts of annual vertebrate pests caused crop losses to be between \$168 million and \$504 million for a 10-county area in California. Further, according to the Internet Center for Wildlife Damage Management, a nonprofit center founded jointly by the Cornell University, University of Nebraska – Lincoln, Clemson University, and Utah State University, both black and yellow-billed magpies cause damage to crops and livestock. Magpies can cause substantial local damage to crops such as almonds, cherries, corn, walnuts, melons,

grapes, peaches, wheat, figs, and milo. Magpies also pick at open wounds and scabs on livestock backs, which can become infected. Magpies are also known to peck the eyes of newborn and sick livestock. All of these damages contribute to the need for a depredation order for yellow-billed magpie.”

*Our Response:* We understand the issues raised by the commenter, but our mandate under the MBTA focuses on bird conservation. The yellow-billed magpie is on the Service’s list of *Birds of Conservation Concern* for the California/Nevada Region (USFWS, 2008). Recently, there have apparently been severe impacts of West Nile virus on the species (Crosbie *et al.* 2008; Ernest *et al.*, 2010). Our concern for this species leads us to remove it from the depredation order.

*Comment (2):* Several commenters either agreed with our proposal or discussed bird species that were not a part of our proposal to revise the current depredation order. Specifically, the Pacific Flyway Council (PFC) agreed that removing the yellow-billed magpie from the depredation order is justified because this species is declining throughout its range. Another commenter stated that yellow-billed magpies are only present in the valleys and adjacent areas of central California, and while the commenter is not aware of any attempts at introduction to other regions, it does not seem that sufficiently similar habitats exist in other parts of the United States. The commenter, therefore, states that the yellow-billed magpie must be protected in its native range.

*Our Response:* We appreciate the commenters’ support of our proposal. We continue to believe that removing the yellow-billed magpie from the depredation order is appropriate. We make this change in this final rule.

Comment (3): One commenter discussed the yellow-headed blackbird, Kern red-winged blackbird, and tricolored blackbird, noting that "... the yellow-headed blackbird is a Bird Species of Special Concern in California due to a decline in breeding colonies throughout the State, the Kern red-winged blackbird is a Bird Species of Special Concern in California due to very limited distribution, and the tricolored blackbird (a Bird Species of Special Concern in California, a Service Focal Species, and a Service Bird of Conservation Concern) occurs in portions of California. The commenter noted that additional protection of these species might be warranted.

*Our response:* We did not change the rule to address these species, though the commenter was correct. We may revise this regulation to prohibit take of Kern-red-winged blackbirds if we determine that it is warranted. Take of tricolored blackbirds is not allowed under the regulation.

*Comment (4):* Black-billed magpies are absent from much of the yellow-billed magpie's range. Therefore, it may simplify the regulation and increase ease of compliance to simply remove all magpies from the depredation order in the relevant counties of California.

*Our Response:* We considered taking the action that the commenter suggested, but unless we determine that take of black-billed magpies under the depredation order is excessive, we will continue to allow black-billed magpies to be taken to protect livestock, in particular.

*Comment (5):* The proposed rule's section on nonlethal control efforts could be clarified with an explanation of the documentation required regarding the manner in which nonlethal methods were attempted and deemed ineffective. Annual reports



submitted under this depredation order should be required to include this information as well.

*Our Response:* In this final rule (see the **Regulation Promulgation** section, below), paragraph (b)(6) of the revised 50 CFR 21.43 specifies that nonlethal control actions must be attempted each calendar year before lethal take is conducted by private citizens. The annual report for activities undertaken under this order requires simple information on nonlethal control methods attempted.

*Comment (6):* One commenter stated that to ensure compliance, further clarification may be needed regarding how detailed the reporting needs to be in describing methods utilized to reduce the capture of nontargets. Another commenter stated that the proposed rule would require that a landowner attempt to use nonlethal control of migratory bird depredation, but it is unclear what constitutes an “attempt.” It is important to recognize that lethal control can frequently be a significant part of a deterrent program. Often, nonlethal control methods become ineffective, and without continued lethal control as a part of a vertebrate pest management program, nonlethal actions will not work. The proposed changes to the regulations are unclear whether or not lethal control methods could be ongoing.

*Our Response:* This final rule revises the regulations to allow lethal control by private individuals, with the condition that nonlethal control must be attempted each calendar year before lethal control is undertaken. If nonlethal control methods are ongoing, they need to be documented on the annual report, which does not need to be detailed. The reporting form provides space for descriptions of methods used, such as “abatement raptors flown daily from 1 April through 31 May,” or “netting placed over

livestock feed from 1 November through 30 April.” We are adding examples of possible nonlethal control methods to 50 CFR 21.43(b)(6) (see the **Regulation Promulgation** section, below).

*Comment (7):* Agriculture should be allowed monetary compensation for crop or livestock damage or loss caused by wildlife that agricultural operators are unable to control through nonlethal attempts.

*Our Response:* The Service does not compensate for such losses.

*Comment (8):* The current depredation order allows for control of species if they are “committing or about to commit depredations on ornamental or shade trees, agricultural crops, livestock, or wildlife, or when concentrated in such numbers and manner that they are a health hazard or other nuisance.” The proposal would narrow the agricultural conditions to the following: “where they are seriously injurious to agricultural and horticultural crops or to livestock feed.” The revised language removes the potential to prevent damage to agricultural productivity. This is significant, as it requires farmers to watch their crop being lost before they are legally allowed to take lethal action.

*Our Response:* In several places, we are adopting regulatory language that is slightly different from the language we proposed. Specifically, concerning agricultural circumstances, this final rule states that a person does not need a Federal permit to control the covered species if they are “causing serious injuries to agricultural or horticultural crops or to livestock feed.” A farmer need not “watch their crop being lost” before taking action. A farmer can attempt nonlethal controls before undertaking lethal controls. Farmers suffering losses are encouraged to consult with U. S. Department of

Agriculture's (USDA's) Animal and Plant Health Inspection Service's (APHIS') Wildlife Services (WS) for expert advice on minimizing damage by migratory birds.

*Comment (9):* Farm Bureau is opposed to the additional information that would be required in the annual reporting requirements included in the proposal. This reporting requirement would lead to a requirement that farmers self-incriminate, if they accidentally take a nontarget species in violation of the MBTA.

*Our Response:* The reporting requirements proposed and in this final rule are the same as would be required of a depredation permittee. Intentional take of species not covered under the depredation order, or flagrant disregard of the prohibition on take of other species, would be grounds for prosecution. The Service compiles information on accidental take of other species to determine if particular species are at risk due to control actions taken under the depredation order.

*Comment (10):* Farm Bureau recognizes the importance of conserving at-risk species and recognizes that information on accidental losses of these species would be helpful in improving their conservation. However, the risk that the proposed reporting requirements place on California farmers could be significant and could create an onerous paperwork burden. In addition to providing species and timing information, agricultural producers would be forced to disclose personal information about themselves and their operations. Farm Bureau opposes incorporating personal information. To address reporting concerns, we suggest creating a reporting requirement that allows agricultural producers to work cooperatively with their county agriculture commissioners to gather such information and submit it in an aggregate fashion. Providing an aggregate report,

without individual identifying information, would provide the necessary information to improve species conservation without jeopardizing California farmers.

*Our Response:* The information on the report form requires disclosure of limited information that often is publically available: name, address, telephone number, and email address. For private individuals, this information will not be disclosed to others. The information required on the report form will help the Service determine take of the species covered under the order, take of nontarget species, the locations of take, the methods of take, and the effectiveness of nonlethal control measures.

*Comment (11):* One commenter believes the increased reporting requirements are justified to allow the Service to receive quality data, and believes the benefit of increased data reporting outweighs the burden on permittees. APHIS WS states that in the proposed rule, the Service estimates it will take 30 minutes to comply with the annual reporting requirements, but if the Service expands the reporting requirements as proposed, the estimated time to comply would be at least 4 hours to collect the information throughout the year and summarize it in the required report. While APHIS WS already collects some of the data as part of its internal reporting requirements, program personnel would still have to pull the data from our internal Management Information System and provide it in the required format.

*Our Response:* We recognize that APHIS WS personnel may undertake much more trapping than many entities that might control depredation under the order. However, until we gather data on reporting times, we stand by our estimate of the average reporting time for all respondents.

*Comment (12):* APHIS WS recommends that the Service retain the existing provision in its regulations that allows for the control of certain species of depredating birds under the depredation order to protect wildlife in general, not just endangered and threatened species. APHIS WS believes that limiting use of the depredation order to protect only endangered and threatened species is unnecessarily restrictive. Much of APHIS WS' work under the order protects unlisted wildlife species and is part of a cooperative multi-agency approach with the goal of preventing "candidate" species from advancing to listed endangered and threatened species. Additional restrictive measures in permit processes would not serve that goal. If the Service finds the use of "wildlife" to be too broad, then APHIS WS would recommend also including species of special concern and State-listed species. The inclusion of wildlife species covered under State conservation efforts would provide for additional protections while still narrowing the scope of this provision.

*Our Response:* We concur with this suggestion. In this final rule, we allow take under the order to protect a species recognized by the Federal Government, a State, or a Tribe as an endangered, threatened, or candidate species, or a species of special concern.

*Comment (13):* One commenter stated that changing the language of the depredation order so that the order may be applied only for the protection of endangered and threatened wildlife species is too restrictive to meet the needs of some States. In some instances, this depredation order has been applied to protect nonlisted wildlife species, such as nesting waterfowl and pheasants. The commenter recommended that the application of the depredation order remain more widely inclusive of all wildlife. The Idaho Department of Fish and Game (IDFG) also did not support limiting the

application of the depredation order to allow take without a permit only for protection of endangered or threatened species. Such action would place unnecessary restrictions on State wildlife management activities and increase the administrative burden on both the applicant and permitting authority. Requiring States or other entities to apply for a depredation permit for individual control actions involving the removal of abundant migratory bird species (*i.e.*, magpies and crows) with a long history of agricultural and wildlife impacts is inconsistent with the current Migratory Bird Program Strategic Plan for permitting: "C-2: In cooperation with partners, develop and implement biologically sound permits, regulations, policies, and procedures to effectively manage and assess the take of migratory birds, while decreasing the administrative burden for permit applicants." Moreover, no population or harvest data for crows suggest that the take under the current hunting framework and depredation order has a population impact on this species that warrants further restrictions. Both crow and magpie populations are sustainable under the current depredation order authorization, and there is no need for further restrictions.

*Our Response:* In 1972, we added magpies, crows, and horned owls to the depredation order, and we expanded the order to cover depredations on livestock or wildlife or "when [the birds included in the order are] concentrated in such numbers and manner as to constitute a health hazard or other nuisance" (37 FR 9223; May 6, 1972). We do not believe it is appropriate to allow take of the covered species simply because they might prey on MBTA-listed species. Nor is it appropriate to allow them to be killed wherever they occur to protect an introduced species, even if it is important to game bird hunting. The key threshold issue is whether the listed species cause substantial

depredation problems in numerous locations, not whether their populations are large and can sustain take. Further, IDFG has not reported any take of covered species since the reporting requirement was put in place. Depredation permits are available to State and Tribal wildlife management agencies if depredation by the species covered (or other MBTA species) is shown to be a problem. See also our response to *Comment (11)*, above.

*Comment (14):* APHIS WS recommended that the Service allow for control work under the depredation order to take place beyond the borders of designated critical habitat for endangered and threatened species. Designated critical habitat may not provide an optimal or even practical location to effectively perform protective control, and many listed species do not have designated critical habitat. APHIS WS personnel often invest significant time in identifying daily patterns of targeted birds. This monitoring often helps APHIS WS personnel locate staging areas, roost sites, and landfills among other locations that are outside of the designated critical habitat but offer the most practical location to conduct control operations. Additionally, operating within designated critical habitat may be detrimental and unnecessarily disruptive to the protected species.

*Our Response:* We concur with the commenter, and have made changes to incorporate this idea. In this final rule, for wildlife protection by the public, we limit application of the depredation order to only allow take without a permit for protection of: (1) a species recognized by the Federal Government as an endangered, threatened, or candidate species, in counties in which the species occurs, as shown in the Service's Environmental Conservation Online System (<http://ecos.fws.gov>); (2) a species recognized by the Federal Government as an endangered or threatened species, in its

designated critical habitat; and (3) species recognized by a State or Tribe as endangered, threatened, candidate, or of special concern on State or tribal lands. For wildlife protection by Federal, State, and Tribal agencies, take for protection of species recognized by the Federal Government, a State, or a Tribe as endangered, threatened, candidate, or of special concern is allowed anywhere in the United States.

*Comment (15):* Two commenters discussed the checking of traps in their comments. APHIS WS recommended maintaining the existing once-per-day trap check as adequate to ensure availability of food, water, and shade and to maintain the welfare of captured birds. Trap locations are selected and traps are designed with the welfare of the birds in mind. APHIS WS always provides protection from rain and direct sunlight. Furthermore, the capture of nontarget birds is rare because APHIS WS uses traps with wire mesh grids that provide large enough openings for most nontargets to escape. Daily checks allow for the release of any nontargets that might remain. Some APHIS WS State offices cover remote locations, and if a provision requiring more frequent trap checks were to be finalized, the wildlife specialists and biologists in these locations would have to use alternative methods because they would be unable to make more than one visit to the trap site per day. It is important to note that alternative methods may not be as discriminating as trapping. The PFC recommended that traps be checked a minimum of once per day, as proposed, to reduce nontarget take at trap sites, unless other information indicates that more frequent checks of traps are warranted.

*Our Response:* This final rule requires that each trap must be checked at least once every day it is deployed. Therefore, a once-per-day trap check is adequate under this rule.



*Comment (16):* One commenter asked for clarification as to whether all injured and debilitated birds or just MBTA-protected, nontarget, injured and debilitated birds must be taken to wildlife rehabilitators. Additionally, some APHIS WS State Directors have pointed out that licensed wildlife rehabilitators may not be located within a practical distance in all States.

*Our Response:* In this final rule, we revised the language under *Trapping conditions* (see the **Regulation Promulgation** section, below) concerning injured or debilitated, nontarget birds to address both of these concerns. This rule states, “If a federally permitted wildlife rehabilitator is within 1 hour or less of your capture efforts, you must send injured or debilitated, nontarget, federally protected migratory birds to the rehabilitator.” Birds of target species need not be sent to a rehabilitator. For a nontarget species, if no rehabilitator is closer than 1 hour away, you may euthanize an injured or debilitated bird unless the species is federally listed as an endangered, threatened, or candidate species, in which case you must deliver it to a permitted rehabilitator and report the take to the nearest U.S. Fish and Wildlife Service Field Office or Special Agent. Paragraph (g) provides options for euthanasia.

*Comment (17):* The proposed rule states that methods of euthanasia would be limited to carbon monoxide or carbon dioxide inhalation, or by cervical dislocation performed by well-trained personnel who are regularly monitored to ensure proficiency. APHIS WS requests clarification that shooting and trapping remain authorized methods of take under the depredation order and that the listed euthanasia methods apply only to birds captured in traps.

*Our Response:* Shooting and trapping remain authorized methods of take under the depredation order. The order's provisions for euthanasia, which we have revised in this final rule, allow captured birds and wounded or injured birds of the covered species to be killed by carbon monoxide or carbon dioxide inhalation, or by cervical dislocation performed by well-trained personnel who are regularly monitored to ensure proficiency.

*Comment (18):* APHIS WS recommended that reporting requirements be confined to nontarget take details only. If the intent of the proposed rule is to gather needed information about nontarget capture and the effects of trapping activities on nontarget species, then the newly proposed reporting requirements should be limited only to those species. Based on the language in the proposed rule, it is not clear that the collection of information regarding all species controlled under the depredation order would have sufficient utility to warrant the additional time spent recording the data in the required FWS format.

*Our Response:* We disagree. It is important to know about nontarget take, but it is equally important for us to be able to compile information on the take of the species covered under the regulation. The annual report will require information on take of both target and nontarget species.

*Comment (19):* APHIS WS believes that the Global Positioning System (GPS) requirement in the proposed rule may be onerous to farmers and other nongovernmental entities. The expense of having to purchase a GPS device could be burdensome to some individuals. Also, there should be consideration given to the fact that some individuals may lack the training or knowledge to properly use such devices.

*Our Response:* We removed the requirement for GPS coordinates that was in the proposed rule. The annual report will require only the name of the county in which control activities were undertaken.

## **Required Determinations**

### *Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

### *Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L.

104-121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small businesses, small organizations, and small government jurisdictions.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We have examined this rule's potential effects on small entities as required by the Regulatory Flexibility Act, and have determined that this action will not have a significant economic impact on a substantial number of small entities because the yellow-billed magpie does not frequently cause depredation problems. Where it does, depredation permits could be issued to alleviate problems.

The only potential costs associated with this regulations change is that a person needing a depredation permit to control yellow-billed magpies will have to pay the application fee for the permit, which is \$100 for organizations and \$50 for homeowners in California. When we updated the Information Collection for this regulation in 2013, only 24 entities reported take under the order. Of the 24, only three were in California, and only two were private entities.

Because the reporting under this regulation indicates that it is not used by many entities, and is used primarily by state and federal agencies, we do not believe that these considerations or the other changes to the regulation (application, trapping conditions, euthanasia, or reporting will have a significant economic impact on a substantial number

of small entities. Accordingly, we certify that a regulatory flexibility analysis is not required.

This rule is not a major rule under the SBREFA (5 U.S.C. 804(2)).

a. This rule will not have an annual effect on the economy of \$100 million or more.

b. This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, Tribal, or local government agencies, or geographic regions.

c. This rule will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

#### *Unfunded Mandates Reform Act*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

a. This rule will not “significantly or uniquely” affect small governments. A small government agency plan is not required. Actions under the regulation will not affect small government activities in any significant way.

b. This rule will not produce a Federal mandate of \$100 million or greater in any year. It will not be a “significant regulatory action” under the Unfunded Mandates Reform Act.

### *Takings*

In accordance with Executive Order 12630, the rule has no takings implications. A takings implication assessment is not required.

### *Federalism*

This rule does not have sufficient Federalism effects to warrant preparation of a federalism summary impact statement under Executive Order 13132. It will not interfere with the ability of States to manage themselves or their funds. No significant economic impacts are expected to result from the change in the depredation order.

### *Civil Justice Reform*

The Department, in promulgating this rule, has determined that this rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988.

### *Paperwork Reduction Act*

This rule contains a collection of information that we submitted to the Office of Management and Budget (OMB) for review and approval under Sec. 3507(d) of the Paperwork Reduction Act (PRA). OMB has approved the information collection requirements and assigned OMB Control Number 1018-0146, which expires 10/31/2017. An agency may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number. We have revised the information collection requirements as follows:

- 50 CFR 21.43(f)(6) requires that when an injured or debilitated bird of a nontarget species is federally listed as an endangered, threatened, or candidate species, you must deliver it to a rehabilitator and report the take to the nearest U.S. Fish and Wildlife Service Field Office or Special Agent.
- We have revised FWS Form 3-202-21-2143 (Annual Report - 50 CFR 21.43 Depredation Order for Blackbirds, Cowbirds, Grackles, Crows, And Magpies) to gather data that will be more useful in assessing actions taken under the order. At present, we cannot assess the impacts of the depredation order on nontarget species. Therefore, we clarify that reporting of activities under this regulation requires a summary of those activities and information about capture of nontarget species. The annual report contains the following new reporting requirements:
  - (1) County in which the birds were captured or killed.
  - (2) Species, if birds were taken for the protection of wildlife, or the crop, if birds were taken for the protection of agriculture.
  - (3) Method of take.
  - (4) Whether captured nontarget species were released, sent to rehabilitators, or died.
  - (5) If trapping was conducted, measures taken to minimize capture of nontarget species.

Comments received on the reporting requirements are discussed above in the preamble.

See comments (5), (6), (9), (10), (11), (16), (18), and (19).

*Title:* Depredation Order for Blackbirds, Grackles, Cowbirds, Magpies, and Crows, 50 CFR 21.43.

*OMB Control Number:* 1018-0146.

*Service Form Number:* 3-202-21-2143.

*Type of Request:* Revision of a currently approved collection.

*Description of Respondents:* Individuals, farmers, and State and Federal wildlife damage management personnel.

*Respondent's Obligation:* Required to obtain or retain a benefit.

*Frequency of Collection:* Annually or on occasion.

REQUIREMENT	ESTIMATED NUMBER OF ANNUAL RESPONDENTS	ESTIMATED NUMBER OF ANNUAL RESPONSES	COMPLETION TIME PER RESPONSE	ESTIMATED ANNUAL BURDEN HOURS
Report Injured/ Debilitated Birds	5	5	1 hour	5
Annual Report – FWS Form 3-202-21-2143	30	30	2.5 hours	75

*Estimated Total Nonhour Burden Cost:* None.

You may send comments on any aspect of these information collection requirements to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, Mailstop BPHC, Falls Church, VA 22041–3803 (mail) or hope\_grey@fws.gov (email).

#### *National Environmental Policy Act*

We have analyzed this rule in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. 432-437(f), and U.S. Department of the Interior regulations at 43 CFR 46 and have determined that the changes can be categorically excluded from the NEPA process. This action will have no significant effect on the quality of the human



environment, nor will it involve unresolved conflicts concerning alternative uses of available resources.

#### *Government-to-Government Relationship with Tribes*

In accordance with the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951), Executive Order 13175, and 512 DM 2, we have evaluated potential effects on federally recognized Indian Tribes and have determined that there are no potential effects. This rule will not interfere with the ability of Tribes to manage themselves or their funds or to regulate migratory bird activities on Tribal lands.

#### *Energy Supply, Distribution, or Use (Executive Order 13211)*

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This action will not be a significant energy action. Because this rule change will not significantly affect energy supplies, distribution, or use, no Statement of Energy Effects is required.

#### *Compliance with Endangered Species Act Requirements*

Section 7 of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that “The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter” (16 U.S.C. 1536(a)(1)). It further states that the Secretary must “insure that any action authorized, funded, or carried out... is not likely to jeopardize the continued

existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat” (16 U.S.C. 1536(a)(2)). We have concluded that the regulation change will not affect listed species.

### **Literature Cited**

Crosbie, S. P., W. D. Koenig, W. K. Reisen, V. L. Kramer, L. Marcus, R. Carney, E.

Pandolfino, G. M. Bolen, L. R. Crosbie, D. A. Bell, and H. B. Ernest. 2008. Early impact of West Nile virus on the yellow-billed magpie (*Pica nuttalli*). Auk 125:542-550.

Ernest, H. B., L. W. Woods, and B. R. Hoar. 2010. Pathology associated with West Nile virus infections in the yellow-billed magpie (*Pica nuttalli*): a California endemic bird. Journal of Wildlife Diseases 46:401–408.

Koenig, W. and M. D. Reynolds. 2009. Yellow-billed Magpie (*Pica nuttalli*), The Birds of North America Online (A. Poole, Editor). Cornell Laboratory of Ornithology, Birds of North America Online: <http://bna.birds.cornell.edu/bna/species/180>, 27 January 2012.

U.S. Fish and Wildlife Service. 2008. Birds of Conservation Concern, 2008. Division of Migratory Bird Management, Arlington, Virginia.

### **List of Subjects in 50 CFR Part 21**

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

## Regulation Promulgation

For the reasons stated in the preamble, we amend part 21 of subchapter B, chapter I, title 50 of the Code of Federal Regulations, as follows:

### PART 21—MIGRATORY BIRD PERMITS

1. The authority citation for part 21 continues to read as follows:

AUTHORITY: 16 U.S.C. 703–712.

2. Revise § 21.43 to read as follows:

#### § 21.43 Depredation order for blackbirds, cowbirds, crows, grackles, and magpies.

(a) *Species covered.*

Blackbirds	Cowbirds	Crows	Grackles	Magpies
Brewer's ( <i>Euphagus cyanocephalus</i> )	Bronzed ( <i>Molothrus aeneus</i> )	American ( <i>Corvus brachyrhynchos</i> )	Boat-tailed ( <i>Quiscalus major</i> )	Black-billed ( <i>Pica hudsonia</i> )
Red-winged ( <i>Agelaius phoeniceus</i> )	Brown-headed ( <i>Molothrus ater</i> )	Fish ( <i>Corvus ossifragus</i> )	Common ( <i>Quiscalus quiscula</i> )	
Yellow-headed ( <i>Xanthocephalus xanthocephalus</i> )	Shiny ( <i>Molothrus bonariensis</i> )	Northwestern ( <i>Corvus caurinus</i> )	Great-tailed ( <i>Quiscalus mexicanus</i> )	
			Greater Antillean ( <i>Quiscalus niger</i> )	

(b) *Conditions under which control is allowed by private citizens.* You do not need a Federal permit to control the species listed in paragraph (a) of this section in the following circumstances:

- (1) Where they are causing serious injuries to agricultural or horticultural crops or to livestock feed;
- (2) When they cause a health hazard or structural property damage;

(3) To protect a species recognized by the Federal Government as an endangered, threatened, or candidate species in any county in which it occurs, as shown in the Service's Environmental Conservation Online System (<http://ecos.fws.gov>);

(4) To protect a species recognized by the Federal Government as an endangered or threatened species in designated critical habitat for the species; or

(5) To protect a species recognized by a State or Tribe as endangered, threatened, candidate, or of special concern if the control takes place within that State or on the lands of that tribe, respectively.

(6) Each calendar year, you must attempt to control depredation by species listed under this depredation order using nonlethal methods before you may use lethal control. Nonlethal control methods can include such measures as netting and flagging, the use of trained raptors, propane cannons, and recordings.

(c) *Conditions under which control is allowed by Federal, State, and Tribal employees.* You do not need a Federal permit to control the species listed in paragraph (a) of this section in the following circumstances:

(1) Where they are causing serious injuries to agricultural or horticultural crops or to livestock feed;

(2) When they cause a health hazard or structural property damage; or

(3) To protect a species recognized by the Federal Government, a State, or a Tribe as an endangered, threatened, or candidate, species, or a species of special concern, including critical habitat for any listed species.

(4) Each calendar year, you must attempt to control depredation by species listed under this depredation order using nonlethal methods before you may use lethal control.

Nonlethal control methods can include such measures as netting and flagging, the use of trained raptors, propane cannons, and recordings. However, this requirement does not apply to Federal, State, or Tribal employees conducting brown-headed cowbird trapping to protect a species recognized by the Federal Government, a State, or a Tribe as endangered, threatened, candidate, or of special concern.

(d) *Ammunition.* In most cases, if you use a firearm to kill migratory birds under the provisions of this section, you must use nontoxic shot or nontoxic bullets to do so. See §20.21(j) of this chapter for a listing of approved nontoxic shot types. However, this prohibition does not apply if you use an air rifle or an air pistol for control of depredating birds.

(e) *Access to control efforts.* If you exercise any of the privileges granted by this section, you must allow any Federal, State, tribal, or territorial wildlife law enforcement officer unrestricted access at all reasonable times (including during actual operations) over the premises on which you are conducting the control. You must furnish the officer whatever information he or she may require about your control operations.

(f) *Trapping conditions.* You must comply with the following conditions if you attempt to trap any species under this order.

(1) You may possess, transport, and use a lure bird or birds of the species listed in paragraph (a) that you wish to trap.

(2) You must check each trap at least once every day it is deployed.

(3) At temperatures above 80° Fahrenheit, the traps must provide shade for captured birds.

(4) Each trap must contain adequate food and water.

(5) You must promptly release all healthy nontarget birds that you capture.

(6) If a federally permitted wildlife rehabilitator is within 1 hour or less of your capture efforts, you must send injured or debilitated nontarget federally protected migratory birds to the rehabilitator. If no rehabilitator is closer than 1 hour away, you may euthanize an injured or debilitated bird of a nontarget species unless the species is federally listed as an endangered, threatened, or candidate species, in which case you must deliver it to a rehabilitator and report the take to the nearest U.S. Fish and Wildlife Service Field Office or Special Agent.

(7) You must report captures of nontarget federally protected migratory birds in your annual report (see paragraph (i) of this section).

(g) *Euthanasia*. Captured birds and wounded or injured birds of the species listed in paragraph (a) may only be killed by carbon monoxide or carbon dioxide inhalation, or by cervical dislocation performed by well-trained personnel who are regularly monitored to ensure proficiency.

(h) *Disposition of birds and parts*. You may not sell, or offer to sell, any bird, or any part thereof, killed under this section, but you may possess, transport, and otherwise dispose of the bird or its parts, including transferring them to authorized research or educational institutions. If not transferred, the bird and its parts must either be burned, or buried at least 1 mile from the nesting area of any migratory bird species recognized by the Federal Government, the State, or a Tribe as an endangered or threatened species.

(i) *Annual report*. Any person, business, organization, or government official acting under this depredation order must provide an annual report using FWS Form 3-202-21-2143 to the appropriate Regional Migratory Bird Permit Office. The addresses

for the Regional Migratory Bird Permit Offices are provided at 50 CFR 2.2, and are on the form. The report is due by January 31<sup>st</sup> of the following year and must include the information requested on the form.

(j) *Compliance with other laws.* You may trap and kill birds under this order only in a way that complies with all State, tribal, or territorial laws or regulations. You must have any State, tribal, or territorial permit required to conduct the activity.

(k) *Information collection.* The Office of Management and Budget has approved the information collection requirements associated with this depredation order and assigned OMB Control No. 1018–0146. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number. You may send comments on the information collection requirements to the Service’s Information Collection Clearance Officer at the address provided at 50 CFR 2.1(b).

Dated: October 30, 2014

**Michael J. Bean,**

*Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.*

*[FR Doc. 2014-26270 Filed 11/04/2014 at 8:45 am; Publication Date: 11/05/2014]*